Office-Supreme Court, U.S.
FILED
MAR 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1065

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES S. KRAVITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where inherently prejudicial publicity — the disclosure of a defendant's withdrawn guilty plea — is pervasively and continuously disseminated in the newspapers and on television throughout the community *during* defendant's trial and where the District Court does not individually *voir dire* the jury concerning such continuing publicity either during deliberations or, at least, following an unsequestered weekend recess, does the District Court's refusal to conduct a post-verdict hearing to *voir dire* the jurors individually in order to determine whether any juror learned during the trial of defendant's withdrawn guilty plea violate this Court's mandate in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954) and require summary reversal and remand for such hearing?

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The sole relief requested in this Petition is summary remand for a post-verdict hearing to conclusively determine whether any juror learned during the trial of Petitioner's withdrawn guilty plea. Contrary to the government's argument (Brief in Opp. 1, 4, 8-9), Petitioner does *not* seek a new trial on the ground that the District Court failed to individually *voir dire* the jurors during trial. Instead, Petitioner seeks only a post-verdict hearing in accordance with this Court's clear mandate in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954), a mandate faithfully adhered to by the federal Circuit Courts of Appeal, with

the sole exception of the Third Circuit. (Pet. 21 n.16.) The government's response on this issue is limited to a single paragraph (with one footnote) at the end of the government's brief.

Significantly, the government does not dispute, nor can it dispute, that the reporting during a trial, as here, of a defendant's prior withdrawn guilty plea is so extremely prejudicial that special precautions must be taken to ensure the impartiality of a jury's verdict. (Pet. 13, 15 and n.9, 17.) Nor does the government deny, because it cannot, that in *Smith v. Phillips* and its progeny this Court explicitly confirmed that a defendant has a right to demonstrate at a post-verdict hearing that such publicity "compromised the ability of the particular jury that heard the case to adjudicate fairly." 455 U.S. at 217. (Pet. 12-13, 20-21.)

Evidently recognizing that there can be no justification in logic or law for the failure to conduct such a hearing in this case, the government devotes the bulk of its argument to the straw issue of whether the District Court erred in failing to conduct individual *voir dire* during trial. The question of individual *voir dire* during trial, however, was not raised as a ground for this Court's review in the Petition and is irrelevant.[1] Rather, Petitioner simply observed that the error in failing to conduct a post-verdict hearing *after* trial was made all the more egregious by the fact that the District Court's prophylactic measures *during* trial were entirely inadequate in light of the severe nature and degree of the in-trial publicity.

For example, in addition to failing to conduct individual *voir dire*, the District Court also (i) failed to remove a newspaper containing a prejudicial article from

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1. In any event, contrary to the government's claim (Brief in Opp. 6), the record of the post-trial argument reflects the District Court's agreement that Petitioner properly preserved his request for individual *voir dire* each day of the trial. (C.A. App. 1216a.)

the jury room during trial, (ii) refused to sequester the jury at the beginning of its deliberations even though the two most prejudicial articles appeared the morning deliberations began, (iii) allowed the jury to return home for a weekend recess when the community was saturated by the prejudicial publicity, and (iv) denied the reasonable requests of both government and defense counsel to interview the jurors after the verdict.[2] Simply stated, a post-verdict hearing is now necessary because the inadequate precautions taken by the District Court simply have not ensured that the jury remained impartial given the special circumstances surrounding this case.

The government contends that it is unnecessary to conduct a post-verdict hearing and seeks to distinguish *Smith v. Phillips* on the ground that "the issue of jury exposure had been raised and resolved in the course of the trial" and "the safeguards taken . . . protected against unfair prejudice and obviated the need for a post-trial hearing." (Brief in Opp. 10 and n.9.) To the contrary, the government's assertion completely ignores this Court's clear admonition in *Smith v. Phillips* that such a conclusion is never warranted, even in cases where more careful precautions are taken:

> *The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible;* it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. . . . *Such determinations [of prejudicial occurrences] may prop-*

2. Contrary to the government's claim that Petitioner did not object to the District Court's decision to excuse the jury for the weekend (Brief in Opp. 7 n.4), the record clearly reflects Petitioner's continued request for sequestration and the District Court's denial of same. (C.A. App. 843a.) Moreover, during argument before the Court of Appeals, the government conceded that Petitioner requested sequestration of the jury at all times during its deliberations.

> *erly be made at a [post-trial] hearing like that ordered in Remmer and held in this case.*

455 U.S. at 217 (emphasis added). (Pet. 14-15.)

More fundamentally, however, in the absence of a post-verdict hearing, the government, Petitioner and this Court can, at best, only speculate whether the measures taken by the District Court did, in fact, preserve Petitioner's right to a fair trial. The issue of jury exposure to prejudicial publicity was not and could not have been "resolved" by the limited and inadequate "safeguards" employed by the District Court in this case. Indeed, in *Smith* this Court confirmed that:

> *[T]he appropriate safeguard* against such prejudice [from publicity during trial] is the defendant's *right to demonstrate* [in a post-verdict hearing] that the media's coverage of his case — be it printed or broadcast — compromised the ability of the particular jury that heard the case to adjudicate fairly.

455 U.S. at 217 (emphasis added). Thus, the need for a post-verdict hearing in this case has not been "obviated" as the government contends.

Given the clear *Smith* mandate, it is not surprising that the government addresses Petitioner's request for a post-verdict hearing in but one paragraph and one footnote. In essence, the strategy of the government's response is to attack a straw issue not asserted as a ground for review — the failure to conduct individual *voir dire* during trial — and then to argue that the real issue — the failure to conduct a post-verdict hearing — is "resolved" by its straw argument concerning the adequacy of *en masse voir dire*.[3] The net effect of this strategy is an abject failure to provide any credible response what-

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3. The cases string-cited by the government (Brief in Opp. 8) in which the trial court was not required to individually *voir dire* jurors are in any event inapposite since none involved inherently prejudicial publicity, as here, of a withdrawn guilty plea.

soever to the sole issue actually raised by Petitioner. The government thus tacitly concedes that the District Court erred in failing to conduct a post-verdict hearing, violating this Court's directive in *Smith v. Phillips*. As this Court held in *Smith:*

> Preservation of the *opportunity* to prove actual bias is a guarantee of a defendant's right to an impartial jury.

455 U.S. at 216 (emphasis added).

Given the extreme, exceptional and, indeed, unique circumstances presented by this case — the repeated reporting of Petitioner's withdrawn guilty plea, especially during jury deliberations — the only way that it can now be guaranteed that Petitioner received his fundamental right to an impartial jury is through a post-verdict hearing. A simple summary remand for such a hearing will achieve that result and is all that this Petitioner requests.

Respectfully submitted,

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